INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 1043

HYMAN SCHER, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The trial court's memorandum opinion on the motion to suppress evidence appears at R. 7–9. The *per curiam* opinion of the Circuit Court of Appeals (R. 76–77) is reported at 95 F. (2d) 64.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 18, 1938 (R. 75), and a petition for rehearing denied April 13, 1938. An order amending the opinion was filed on the same day. (R. 89.) The petition for writ of certiorari was filed May 18, 1938. The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

(1) Whether the motion to suppress the evidence seized upon a search of petitioner's automobile was properly overruled.

(2) Whether the trial court erred in excluding testimony as to the identity and reliability of the Government's confidential informer.

STATEMENT

Petitioner was indicted in the United States District Court for the Northern District of Ohio on two counts of an indictment charging, respectively, the possession and transportation in a certain automobile of 24 quarts of gin and 13⅓ gallons of whisky, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed thereon, in violation of the Liquor Taxing Act of 1934 (c. 1, Title II, Sec. 201, 48 Stat. 313, 316; U. S. C., Title 26, Sec. 1152a) (R. 2–3).

Before trial petitioner filed a motion to suppress evidence, which was overruled and an exception noted (R. 4–9, 11). During the course of the trial an Alcohol Tax Unit agent testifying for the Gov-

ernment was asked on cross examination to state the name of his confidential informer and the source of his information. Objections on the part of Government counsel to the questions were sustained and exceptions noted. (R. 34–35, 36.) At the close of the Government's case the petitioner made a motion for a directed verdict, which was overruled and an exception preserved (R. 36–37). It does not appear that the motion was renewed at the end of the whole case. Petitioner was convicted on both counts of the indictment and was sentenced to imprisonment for a year and a day and to pay a fine of $500 and costs (R. 10–11). A motion for a new trial was overruled (R. 12–13).

On appeal to the Circuit Court of Appeals for the Sixth Circuit the judgment was unanimously affirmed (R. 75, 77) and a petition for rehearing denied (R. 89).

At the hearing on the motion to suppress evidence, Alcohol Tax Unit investigator Bowes testified substantially as follows: He and other officers received information, from a source which had theretofore been found reliable, that the so-called Carr-Burke-Rosenthal gang were operating from headquarters at 10838 Drexel Avenue, Cleveland, Ohio; that they were putting out the same kind of "phony" whiskey[1] as they had at 10600 Drexel Avenue; and that at about midnight, on December

[1] "Phony" liquor, according to the agents' later testimony on the trial of the case, meant to them bootleg or tax unpaid liquor (R. 31, 33).

30, 1935, a load of this whiskey would be taken from the above premises, No. 10838 Drexel Avenue, in a Dodge car, License No. LX–418. The agents posted themselves in the premises and at about 9:30 P. M. saw the above described car arrive and remain there about an hour. At the expiration of that time a man resembling the petitioner came from the house, which was a private dwelling, accompanied by three women, all of whom entered the car and drove away. The man had a package in his hand of the same size and shape as those later seized containing whiskey. The car returned about midnight. Previously it had parked in the street. This time it stopped at the rear of the house near the door which led into the basement. The headlights were turned off and it remained about half an hour. It was agreed at the hearing that Agent Williamson, who was stationed near the premises at the time in question, would testify, if present, as follows: "I heard something heavy set down, like wood, and heard it slide, like it was heavy paper, across a wooden surface, and I heard the house door slam, the trunk slam, and the door of the car slam." The cases of liquor later seized, six bottles to the case, were wrapped in very heavy brown wrapping paper with at least two wrappings and with heavy cord around them crosswise so that they could readily be picked up. The car left about 12:30 with the petitioner the only passenger. It appeared to the agents to be loaded more heavily than on the previous trip with the driver and the

three women in it. The agents followed the car two or three blocks when it stopped for gasoline. It then proceeded two or three blocks more, with the agents following, and as they were about to close up on it the car turned into a driveway at 10025 Olivet Avenue, which later proved to be petitioner's home. Agent Bowes left the Government car as soon as it could be stopped and followed the bootleg car into the garage. The headlights were still on and petitioner had just alighted from the car and walked to the back door of the garage. The agent said, "I am a Federal officer, I have a tip that this car is hauling bootleg liquor." The petitioner said, "Just a little for a party." The agent said, "Is it tax paid?" Petitioner replied, "It is Canadian whiskey." The agent said, "Is it in there?" and petitioner said, "It is." The agent then opened the trunk on the rear of the car and found 14 packages, totaling 88 bottles, of untaxpaid liquor, two bottles being found next to the driver's seat. Petitioner was placed under arrest and the car and liquor were seized. (R. 24–27.)

ARGUMENT

1. Petitioner contends, first, that his motion for a suppression of evidence should have been sustained, because there was no probable cause for the search and seizure, and that the admission of the evidence obtained as a result thereof deprived him of his rights under the Fourth and Fifth Amendments. He especially contends that the agents had

no cause to believe that the liquor transported and possessed was tax unpaid liquor; that the search of the automobile constituted a search of the garage and that, since the garage was within the curtilage of petitioner's home, it could not be searched without a search warrant. We submit that the contentions are without merit.

The agents had confidential and reliable information that a certain named bootleg gang formerly operating at another address in Cleveland, Ohio, were putting out tax unpaid liquor at 10838 Drexel Avenue and that a Dodge car, License No. LX-418, would call at these premises at about midnight on December 30, 1935, to take away a load of this liquor. The car described by the informant appeared at the place and at the time given, drew up to the rear door and the lights were turned off. There was the sound of the rustling of papers against a hard surface, the sound of heavy objects being set down on a hard surface, followed by the slamming of a heavy door and the closing of the house door. The agents earlier that evening had seen a package wrapped in paper taken by the petitioner from the premises in the same car. When the agents followed the car upon leaving the premises after midnight, they noticed that it was heavier loaded with one person in it than it was earlier in the evening when it contained four passengers. As the agents were closing in on petitioner's car, he swerved into a private driveway and into a garage. He was immediately followed by one of the agents

and when questioned as to whether he was hauling bootleg liquor, he replied, "Just a little for a party." When asked whether it was taxpaid, he made the evasive answer that it was Canadian whiskey. These responses, together with the agents' prior information from a reliable source that the place from which the car left was operated by a bootleg gang and that this particular car would be there for a load of liquor at the time it did arrive; the most suspicious circumstances of time, place, and method under which the car was loaded, and the fact that it carried a heavy load, all were sufficient, we submit, to lead a reasonably prudent and cautious officer to believe that the car which he was about to search contained tax-unpaid liquor.

No part of the garage or premises was searched. The only thing searched was the automobile which the agents had followed continuously from the place where the contraband was obtained. As they were about to stop the car, it drove off the street into a garage with the officer following on foot. The door of the garage was open. Petitioner had just alighted from the car and met the agent at the door. The pursuit on the street and the search were one continuous and uninterrupted process. There was no intent or purpose on the part of the agents to search the garage or private dwelling and no such search was made. It cannot be sucessfully contended that an automobile which the officers had reasonable cause to believe was carrying contraband and which they were about to search could

secure immunity by being run into a private garage. A garage has not become the altar of a medieval church which can afford immunity to a malefactor who manages to reach it. Even if it be conceded that the search without a warrant of an automobile in a garage adjacent to a private dwelling is prima facie unlawful, we submit that under the facts and circumstances of this case the officers could reasonably conclude that a crime was being committed in their presence which would justify an arrest and search and seizure without a warrant.

The decision of the court below upholding the search and seizure is supported by the following cases: *Husty* v. *United States*, 282 U. S. 694, 700–701; *Carroll* v. *United States*, 267 U. S. 132, 153, 155–162; *Wisniewski* v. *United States*, 47 F. (2d) 825 (C. C. A. 6th); *Ferracane* v. *United States*, 47 F. (2d) 677 (C. C. A. 7th); *Rodriguez* v. *United States*, 80 F. (2d) 646 (C. C. A. 5th).

The cases relied on by petitioner to show a conflict may be distinguished on their facts and are not applicable here. They relate to the search of automobiles without probable cause or to the search of garages or private dwellings without search warrants. Petitioner relies especially, as he did in the courts below, on *United States* v. *Kind*, 87 F. (2d) 315 (C. C. A. 2d). While the facts in that case are somewhat similar to those in the instant case, the trial court, in its memorandum opinion (R. 7–9) reconsidered the validity of the search and seizure in the light of the *Kind* case and pointed out dis-

tinctive differences in the facts in the two cases which show that they are not in direct conflict.

2. Petitioner next contends that the trial court erred in not permitting him to cross examine the Government's witnesses with respect to the identity of the confidential informer and the source of their information so that the court might determine whether or not the witnesses had reasonable cause to believe this information and whether the information was reliable. He further claims that he was entitled to know the identity of the informer so that he might, if possible, impeach the testimony of the Government witnesses.[3]

We submit that petitioner's contentions are foreclosed by the overwhelming weight of authority, which is to the effect that for reasons of public policy the sources of confidential information given to Government officers must be kept secret and need not be disclosed. *Segurola* v. *United States,* 16 F. (2d) 563, 565 (C. C. A. 1st), affirmed on other grounds, 275 U. S. 106; *Shore* v. *United States,* 49 F. (2d) 519, 522–523 (App. D. C.), certiorari

[3] The confession of error filed by the Government in the Circuit Court of Appeals upon petitioner's former appeal, to which he refers in his brief (p. 35), was predicated, the Department files indicate, upon certain testimony by agents concerning petitioner's supposed activities in West Virginia, which was based upon information which proved to be erroneous. These agents did not testify at the second trial of the petitioner and there is nothing in the record or Department files which discloses that the information which resulted in the search of the petitioner's car came from the same informer.

denied, 283 U. S. 865; 285 U. S. 552; *Malnes* v. *United States*, 62 F. (2d) 180 (C. C. A. 9th); *Wilson* v. *United States*, 65 F. (2d) 621, 624 (C C A. 3d); *Goetz* v. *United States*, 39 F. (2d) 903 (C. C. A. 5th); cf. *Vogel* v. *Gruaz*, 110 U. S. 311, 316.

The only case cited to the contrary by petitioner is *United States* v. *Blich*, 45 F. (2d) 627, decided in 1930 by the District Court for the District of Wyoming. While three of the above cases were decided before the *Blich* case, namely, the *Segurola*, *Goetz* and *Vogel* cases, it appears from the court's opinion in the *Blich* case (p. 629) that none of these was called to its attention. The conflict with the District Court decision in the *Blich* case is, of course, one not requiring the issuance of a writ of certiorari.

CONCLUSION

The case was correctly decided below and no adequate reason is presented why it should be further reviewed by this Court. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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